

24TH FEDERAL LITIGATION COURSE

FEDERAL REMEDIES

I. SOVEREIGN IMMUNITY.

A. General.

1. The Doctrine: The United States cannot be sued without the consent of Congress. *Block v. North Dakota*, 461 U.S. 273, 287 (1983).

“The United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain that suit.”

--*United States v. Sherwood*, 312 U.S. 584, 586 (1941).

2. Scope of the Doctrine: Applies to lawsuits against the United States, its agencies, and its officials sued in their official capacities. *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963).

B. Waivers of Sovereign Immunity.

1. General.

- a) Only Congress can waive the sovereign immunity of the United States. *Block v. North Dakota*, 461 U.S. 273 (1983).
- b) Waivers of sovereign immunity are strictly construed. *McMahon v. United States*, 342 U.S. 25 (1951).
 - (1) Congressional waivers of sovereign immunity cannot be implied, but must be unequivocally expressed. *United States v. Mitchell*, 445 U.S. 535 (1980). *Booth v. United States*, 990 F.2d 617 (Fed. Cir. 1993).

- (2) Congressional conditions on waivers of sovereign immunity are jurisdictional prerequisites to suit. *Block v. North Dakota*, 461 U.S. 273 (1983); *Lehman v. Nakshian*, 453 U.S. 156 (1981); *United States v. Kubrick*, 444 U.S. 111 (1979); *Phillips v. Heine*, 984 F.2d 489 (D.C. Cir. 1993). But see *Irwin v. Veterans Administration*, 498 U.S. 89 (1990) (statutes of limitations in suits against the United States are presumptively subject to the doctrine of equitable tolling).

2. Monetary relief.

- a) The Tucker Act. 28 U.S.C. §§ 1346(a)(2), 1491.
- b) The Federal Tort Claims Act. 28 U.S.C. § 1346(b).
- c) Other specialized statutes.
 - (1) The Privacy Act, 5 U.S.C. § 552a.
 - (2) The Unjust Conviction Act, 28 U.S.C. §§ 2513, 1495.
 - (3) The Equal Access to Justice Act, 28 U.S.C. § 2412; 5 U.S.C. § 504).
 - (4) The Civil Rights Act of 1991, Pub. L. 102-166, see 42 U.S.C. § 1981 note.
- d) Commonly asserted provisions that do not waive sovereign immunity for monetary relief.
 - (1) The federal question jurisdiction statute, 28 U.S.C. § 1331. See, e.g., *Gilbert v. DaGrossa*, 756 F.2d 1455 (9th Cir. 1985); *Garcia v. United States*, 666 F.2d 960 (5th Cir.), cert. denied, 459 U.S. 832 (1982).
 - (2) The commerce and trade regulation statute, 28 U.S.C. § 1337. See, e.g., *Hagemeier v. Block*, 806 F.2d 197 (8th Cir. 1986), cert. denied, 481 U.S. 1054 (1987).

- (3) The civil rights jurisdiction statute, 28 U.S.C. § 1343. See, e.g., Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972).
- (4) The mandamus statute, 28 U.S.C. § 1361. See, e.g., Doe v. Civiletti, 635 F.2d 88 (2d Cir. 1980).
- (5) The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. See, e.g., Mitchell v. Riddell, 402 F.2d 842 (9th Cir. 1968), cert. denied, 394 U.S. 456 (1969).
- (6) The Administrative Procedure Act, 5 U.S.C. §§ 701-06. See, e.g., Rhodes v. United States, 760 F.2d 1180 (11th Cir. 1985).
- (7) The Constitution. See, e.g., United States v. Testan, 424 U.S. 392 (1976).

3. Nonmonetary claims.

a) The Administrative Procedure Act (APA), 5 U.S.C. § 702.

The statute: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. . . .”-- 5 U.S.C. § 702

- (1) The APA waives sovereign immunity in nonmoney claims against the federal government. See, e.g., Dep’t of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999); Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984); B.K. Instruments, Inc. v. United States, 715 F.2d 713 (2d Cir. 1983); Jaffee v. United States, 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979).

- (2) Application of the APA to the military:
 - (a) General rule: APA is applicable to the military departments.
 - (b) Exceptions:
 - (i) Court-martial and military commissions.
 - (ii) Military authority exercised in the field in time of war or in occupied territory.
- b) Other specialized statutes.
 - (1) The Freedom of Information Act, 5 U.S.C. § 552.
 - (2) The Privacy Act, 5 U.S.C. § 552a.

II. FEDERAL JUDICIAL REMEDIES.

A. General.

B. Money Damages.

- 1. Tort claims: FTCA, 28 U.S.C. §§ 1346(b), 2671-2680.
- 2. Nontort claims: The Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491.
 - a) Dependence of Tucker Act on independently standing substantive rights.
 - (1) General rule: The Tucker Act does not create a substantive basis for the recovery of money from the United States; it only provides a jurisdictional vehicle for asserting money claims based upon a contract, or upon a constitutional, statutory, or regulatory provision that grants a plaintiff a right to monetary relief. *United States v. Testan*, 424 U.S. 392 (1976). *Murphy v. United States*, 993 F.2d 871 (Fed. Cir. 1993).

(2) Back pay claims.

(a) Civilian employees: The Back Pay Act, 5 U.S.C. § 5596(b).

(b) Military personnel: The military pay statute, 37 U.S.C. § 204.

(i) The general concept. Until a servicemember's entitlement to pay has been legally terminated by the expiration of his term of enlistment or as otherwise prescribed by law, he has a statutory right to receive the monetary benefits of his service.

(ii) Officers. *Werner v. United States*, 642 F.2d 404 (Ct. Cl. 1981).

(iii) Enlisted personnel. *O'Callahan v. United States*, 451 F.2d 1390 (Ct. Cl. 1971).

(3) Disability retirement benefits. 10 U.S.C. § 1201. *Sawyer v. United States*, 930 F.2d 1577 (Fed. Cir. 1991).

b) Other issues.

(1) Statute of limitations. 28 U.S.C. §§ 2401(a), 2501.

(2) Appeals from Tucker Act cases: U.S. Court of Appeals for the Federal Circuit. 28 U.S.C. §§ 1295(a)(2) and (3).

(3) Interlocutory appeal of grant or denial of motion to transfer from district court to Court of Federal Claims. 28 U.S.C. § 1292(d)(4)(1988). *Mitchell v. United States*, 930 F.2d 893 (Fed. Cir. 1991).

C. Mandamus, 28 U.S.C. § 1361.

1. Scope of the mandamus remedy.
 - a) General. Mandamus relief is available only when the defendant owes a clear duty to the plaintiff to do the act demanded; the duty must be ministerial, as opposed to discretionary, in character. See, e.g., United States ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540 (1937); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Pescosolido v. Block, 765 F.2d 827 (9th Cir. 1985).
 - b) Elements. Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970). See also Arabe v. White, 110 Fed. Appx. 51 (9th Cir. 2004); Fallini v. Hodel, 783 F.2d 1343 (9th Cir. 1986); Borntrager v. Stevas, 772 F.2d 419 (8th Cir.), cert. denied, 474 U.S. 1008 (1985); United States v. O’Neil, 767 F.2d 1111 (5th Cir. 1985); Saum v. Widnall, 912 F.Supp. 1384 (D. Colo. 1996); NTEU v. Bush, 715 F. Supp. 405 (D.D.C. 1989).
 - c) Plaintiff has a clear right to relief.
 - (1) Defendant has a duty to act.
 - (2) No other remedy available.
2. Practice pointers.

D. Habeas Corpus, 28 U.S.C. §§ 2241-55.

1. Custody requirement.

- a) Courts-martial sentences to confinement. Ex parte Reed, 100 U.S. 13 (1879).
- b) Challenges to involuntary military service. *Parisi v. Davidson*, 405 U.S. 34 (1972).

2. Location of the custodian.

- a) Imprisonment. *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).
- b) Military service--active duty. Ex parte Hayes, 414 U.S. 1327 (1973); *Schlanger v. Seamans*, 401 U.S. 487 (1971).
- c) Military service--reservists. *Strait v. Laird*, 406 U.S. 341 (1972). But see limitation of *Strait v. Laird* holding recognized by *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

E. Injunctive Relief, Fed. R. Civ. P. 65.

1. Types of Injunctive Relief.

- a) Temporary restraining order [TRO].
- b) Preliminary injunction.
- c) Permanent injunction.

F. Declaratory Judgment. 28 U.S.C. §§ 2201-2202.

- 1. The statute: “In a case or controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . .”

-- 28 U.S.C. § 2201.

2. Historical origins.
3. Nature of the remedy: A declaratory judgment is an instrument by which a court can adjudicate the rights of parties to a controversy without directing any coercive relief. E. Borchard, *Declaratory Judgments* 25-26 (2d ed. 1941); Developments in the Law -- Declaratory Judgments, 62 Harv. L. Rev. 787 (1949).
 - a) Irreparable injury not a condition precedent to declaratory relief. *Steffel v. Thompson*, 415 U.S. 452 (1974); *CCCCO-Western Region v. Fellows*, 359 F. Supp. 644 (N.D. Cal. 1972).
 - b) Actual controversy must exist between the parties. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972); *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941).
 - c) May not seek declaratory judgment challenging retention in Armed Forces...habeas corpus is exclusive remedy. *Rooney v. Secretary of the Army*, 405 F.3d 1029 (D.C. Cir. 2005).
4. Only a remedy, not a grant of jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1952).